Supreme Court, U.S.
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No. 10- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHARLES F. KERCHNER, JR., et al.,

Petitioners,

v.

BARACK HUSSEIN OBAMA, II, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioners sufficiently articulated a case or controversy against respondents which gives them Article III standing to make their Fifth Amendment due process and equal protection claims against them.

2. Whether putative President Obama can be an Article II "natural born Citizen" if he was born in the United States to a United States citizen mother and a non-United States citizen British father and under the British Nationality Act 1948 he was born a British citizen.

3. Whether putative President Obama and Congress violated petitioners' Fifth Amendment due process rights to life, liberty, safety, security, tranquility, and property and Ninth Amendment rights by Congress failing to assure them pursuant to the Twentieth Amendment that Obama qualified as an Article II "natural born Citizen" before confirming his electoral votes and by Obama refusing to conclusively prove that he is a "natural born Citizen."

4. Whether Congress violated petitioners' rights under the Fifth Amendment to equal protection of their life, liberty, safety, security, tranquility, and property by investigating and confirming the "natural born Citizen" status of presidential candidate, John McCain, but not that of presidential candidate, Barack Obama.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the District Court are the petitioners, Charles F. Kerchner, Jr.; Lowell T. Patterson; Darrell James LeNormand; Donald H. Nelsen, Jr.

The respondents are Barack Hussein Obama, II, President Elect of the United States of America, President of the United States of America, and Individually; United States of America; United States Congress; United States Senate; United States House of Representatives; Richard B. Cheney, President of the Senate, Presiding Officer of Joint Session of Congress, Vice President of the United States and Individually; Nancy Pelosi, Speaker of the House and Individually. The same parties were also in the Circuit Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF ALL PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	viii
TABLE OF CITED AUTHORITIES	ix
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AND TREATISE INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
I. The Third Circuit Court of Appeals has decided an important question of federal law concerning Article III standing that has not been but should be settled by this Court	9

Contents

Page

A. Standing and subject matter jurisdiction are important questions of federal law 9

B. The Court should exercise its supervisory powers regarding standing and subject matter jurisdiction 10

C. The Circuit Court's decision on standing implicates the questions of the meaning and application of the "natural born Citizen" clause and Congress' duty under the Twentieth Amendment to enforce it which are important constitutional questions 13

1. Having a person sit as President and Commander in Chief of the Military who is not a "natural born Citizen" puts the national security of the United States vitally at risk 14

2. The rule of law needs to be protected 16

Contents

Page

3. The Supreme Court should grant review so as to maintain the proper balance of power between the three branches of government in our constitutional republic 17

4. Whether or not the President and Commander in Chief is legitimately sitting in those offices impacts the nation's foreign policy 18

5. The nation needs a definition of "natural born Citizen" for future presidential and vice presidential elections 19

II. The Third Circuit Court of Appeals erred in concluding that petitioners do not have standing to bring their claims and the Court should exercise its error-correction function to correct such error 19

A. The standing standard 20

B. Application of the standard 21

1. Petitioners have suffered an injury in fact 21

Contents

Page

a. The injury is concrete 21

b. The injury is particularized .. 23

c. The injury is actual or imminent 26

2. There is a causal connection between the injury and the conduct of which they complain 26

3. It is likely and not merely speculative that their injuries will be redressed by a favorable court decision 27

a. Congress cannot define a "natural born Citizen" 27

b. The executive cannot define a "natural born Citizen" 28

c. The political parties and the popular vote cannot define a "natural born Citizen" 29

Contents

Page

d. Only the judiciary can define a "natural born Citizen" 29

C. *Berg* is distinguishable 31

III. Obama has not conclusively proven that he is an Article II "natural born Citizen" 32

IV. Congress violated the Twentieth Amendment 35

V. Congress violated petitioners' equal protection to life, liberty, safety, security, tranquility, and property under the Fifth Amendment 35

VI. Justice Sonia Sotomayor and Justice Elena Kagan should recuse themselves from having any involvement in this case 36

CONCLUSION 36

TABLE OF APPENDICES

Page

APPENDIX A: Opinion of the United States Court of Appeals for The Third Circuit Filed July 2, 2010 ..... 1a

APPENDIX B: Opinion of the United States District Court for the District of New Jersey Filed October 20, 2009 ..... 12a

APPENDIX C: Statutory Provisions and Treatise Involved 24a

TABLE OF CITED AUTHORITIES

Page

CASES

American Ins. Ass'n v. Geramendi,
539 U.S. 396 (2003) 18

Barnett v. Obama,
No. 09-0082, ___ F. Supp. 2d ___,
2009 WL 3861788 (C.D. Cal. Oct. 29, 2009),
recons. denied (Dec. 4, 2009),
appeal pending (9th Cir.) 10-11

Berg v. Obama,
586 F.3d 234 (3d Cir. 2009) 7, 11, 31

Bruner v. United States,
343 U.S. 112 (1952) 10

Chisholm v. Georgia,
2 U.S. (2 Dall.) 419 (1793) 16

Christopher v. Harbury,
536 U.S. 403 (2002) 18

Cohen v. Obama,
No. 08-2150, 2008 WL 5191864 (D.D.C. Dec. 11, 2008), *aff'd*, *Cohen v. Obama*, 332 F. App'x 640 (D.C. Cir. Sept. 8, 2009) (per curiam), *reh'g denied* (D.C. Cir. Nov. 25, 2009), *reh'g en banc denied*, slip copy (D.C. Cir. Nov. 25, 2009) 11

Cited Authorities

Page

Cohens v. Virginia,
19 U.S. 264 (1821) 32

Cook v. Good ,
2009 WL 2163535 (M.D. Ga. July 16, 2009),
appeal dismissed, No. 09-14698-CC (11th Cir.
Nov. 24, 2009) 11

Dawson v. Obama ,
2009 WL 532617 (E.D. Cal. Mar. 2, 2009) 11

Essek v. Obama,
No. 08-379-GFVT (E.D. Ky. Jan. 15, 2009) ... 11

Federal Election Commission v. Akins,
524 U.S. 11 (1998) 26, 32

Flast v. Cohen,
392 U.S. 83 (1968) 25, 32

Florida v. Rodriguez,
469 U.S. 1 (1984) 10

FMC v. S.C. State Ports Auth.,
535 U.S. 743, 122 S. Ct. 1864,
152 L. Ed. 2d 962 (2002) 16

Gladstone Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 25

Cited Authorities

Page

Hamblin v. Obama ,
No. 09-17014, 2009 WL 2513986 (D. Ariz. Aug. 14, 2009) 11

Hamdan v. Rumsfeld,
546 U.S. 1002, 126 S.Ct. 2749 (2006) 17-18

Hollander v. McCain ,
566 F. Supp. 2d 63 (D.N.H. July 24, 2008) 11

Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221 (1986) 32

Kawakita v. United States,
343 U.S. 717 (1952) 22

Linda R.S. v. Richard D,
410 U.S. 614 (1973) 32

Lujan v. Defenders of Wildlife,
504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ..... *passim*

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 16, 30

Massachusetts v. EPA,
549 U.S. 497, 127 S.Ct. 1438 1447 (2007) ... 9-10, 32

Patriot's Heart Media Network, Inc. v. Soetoro, No. 1:09-mc-00442-RCL (D.D.C. Sept. 10, 2009) 11

Page

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 20

Robinson v. Bowen, 567 F. Supp. 2d 1144, slip copy (N.D. Cal. Sept. 16, 2008) 11

Sierra Club v. Morton, 405 U.S. 727 (1972) 32

Strunk v. N.Y. State Bd. of Elections, No. 1:08-cv-04289-ARR-LB (E.D.N.Y. Oct. 30, 2008), *appeal dismissed*, No. 08-5422 (2d Cir. Nov. 14, 2008) 11

United States v. Richardson, 418 U.S. 166 (1974) 25

United States v. SCRAP, 412 U.S. 669 (1973) 32

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 9

Vassilios v. Kennedy, 95 F.Supp. 630 (D.C.Cir. 1961) 34

Cited Authorities

Page

CONSTITUTION

United States Constitution

Article I, Section 2 and 3 29

Article II ..... *passim*

Article II, Section 1, Clause 5 .....1, 9, 33

Article III ..... *passim*

Fifth Amendment ..... *passim*

Ninth Amendment 2, 13

Twentieth Amendment 2, 12, 13

Twenty-Fifth Amendment 30

STATUTES

3 U.S.C. Sec. 15 ..... 3, 13

28 U.S.C. Sec. 455 3

28 U.S.C. Sec. 455(a) and (b)(4) 36

28 U.S.C. Sec. 1254(1) 1, 33

Page

28 U.S.C. Sec. 1291 7

28 U.S.C. Secs. 1331, 1343(a)(3)-(4), 1346(a)(2), 1361, 1651(a), and 2201(a)-2202 4

COURT RULES

Fed.R.Civ.P. 12(b)(1) 6

Fed. R. Evid. 201(d) 15

OTHER AUTHORITIES

Emer de Vattel, *The Law of Nations, or Principles of the Laws of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, bk. 1, c. 19, sec. 212 (original French in 1758 and first English in 1759, and other subsequent French and English editions) 3, 34

FOREIGN LAW

British Nationality Act 1948 4

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals (App. A, 1a-16a), affirming the District Court's decision is reported at 612 F.3d 204 (3d Cir. 2010).

The opinion of the District Court (App. B, 12a-23a) is reported at 669 F. Supp. 2d 477 (D.N.J. 2009)

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on July 2, 2010. App. A, 1a. This petition is filed within 90 days of that date. Rule 13.1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND TREATISE INVOLVED

Article II, Section 1, Clause 5 provides:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

The Fifth Amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Twentieth Amendment provides in pertinent part:

> Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.
>
> Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

3 U.S.C. Sec. 15 provides in pertinent part: found at Appendix C, 24a-25a.

28 U.S.C. Sec. 455 provides: found at Appendix C, 25a-28a.

Emer de Vattel, *The Law of Nations, or Principles of the Laws of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, bk. 1, c. 19, sec. 212 (original French in 1758 and first English in 1759, and other subsequent French and English editions) § 212. Citizens and natives: found at Appendix C, 29a.

STATEMENT OF THE CASE

This petition involves the question of whether petitioners have Article III standing to enforce Article II's "natural born Citizen" clause and thereby seek through the Ninth Amendment and the Fifth Amendment itself to protect their Fifth Amendment rights to life, liberty, safety, security, tranquility, and property. The underlying merits involve the question of what is the meaning of Article II's "natural born Citizen" clause as applied to a President-Elect and currently putative sitting President. The merits also involve the question of what is the duty of Congress, the President of the Senate, and the Speaker of the House under the Twentieth Amendment when confirming a President-Elect's electoral votes. These are important questions of federal law that have not been but should be settled by this Court. Because the merits of petitioners' claims present a rare case of extraordinary public importance, we are also requesting that this Court reach the underlying merits of petitioners' claims.

Putative President, Barack Hussein Obama ("Obama") has not yet conclusively proven that he was born in the United States. Complaint para. 34-70. Obama is not an Article II "natural born Citizen, for Obama's father, Barack Obama Sr., at the time of Obama's birth in 1961 was a British subject/citizen subject to the jurisdiction of the United Kingdom, and handed down British citizenship to his son, Obama. British Nationality Act 1948. His father was never a United States citizen nor was he even a permanent resident. *Id.* para. 72-74. They both became Kenyan citizens when Kenya got its independence in 1963. *Id.* para 73. Obama's relationship to his Indonesian step-father and move to Indonesia when he was a child with his mother and step-father, and his travels to Pakistan in 1981, also raise doubts to be resolved through discovery about whether Obama is a "natural born Citizen." *Id.* para. 76-78. If Obama was not born in the United States, there exists a possibility that Obama could be an illegal alien. *Id.* para. 79-83. The Democratic National Committee (DNC) did not adequately vet and verify Obama's Article II "natural born citizenship" status. Contrary to 3 U.S.C. Sec. 15, during the January 8, 2009 Joint Session of Congress held for purposes of confirming the electoral votes cast for President-Elect Obama and Vice-President Elect Biden, Cheney did not openly call for the objections to the votes after the votes from each and every state were presented.

In the Federal District Court

Invoking the District Court's jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3)-(4), 1346(a)(2), 1361, 1651(a), and 2201(a)-2202, petitioners filed a Complaint for

Emergency Injunction, Declaratory Relief, Mandamus, and Petition for Quo Warranto at about 2:50 a.m. on January 20, 2009, when Congress had already confirmed Obama's President Elect status but before Chief Justice Roberts swore him in as President after 12 Noon on January 20, 2009. Dkt. Entry 1 and 21. While petitioners amended that pleading two more times, the Second Amended Complaint/Petition is the only pleading petitioners served upon respondents. Dkt. Entry 7-13. Who the petitioners are is fully set out in the Second Amended Complaint/Petition. Dkt. Entry 3, para. 8-11.

In the complaint/petition, petitioners allege that Obama has not conclusively proven that he was born in Hawaii. They also allege that even if he was so born, he is not an Article II "natural born Citizen" because his father was a British subject/citizen when Obama was born and Obama himself was born a British subject/citizen, all of which makes him ineligible to be President and Commander in Chief of the Military. Specifically, they made a claim against Congress based on the First Amendment (by abridging their right to petition the government for a redress of grievances); a claim against Congress based on the Fifth Amendment (deprivation of liberty, safety, security, protection, and tranquility without procedural and substantive due process of law by violating its constitutional duty under the Twentieth Amendment to adequately investigate and confirm whether Obama is an Article II "natural born Citizen"); a claim against Congress based on the Fifth Amendment (denial of equal protection by protecting them and other citizens as to McCain's "natural born Citizen" status but not as to Obama's); a claim against Obama based on the Fifth Amendment (deprivation of

liberty, safety, security, protection, and tranquility without substantive due process of law by failing to adequately prove and to prove he is an Article II "natural born Citizen" and occupying the Office of President while not being eligible for the that Office); a claim against both Obama and Congress based on the Ninth Amendment (denial of rights retained by the people in failing to address Obama's lack of qualification to be President); and a claim against Obama based on quo warranto (occupying the Office of President while not being eligible for that office). They also made claims against former Vice President Dick Cheney and current Speaker of the House Nancy Pelosi for allowing and facilitating the ineligible Obama to occupy the Office of President.

Respondents filed a motion to dismiss petitioners' complaint/petition under Fed.R.Civ.P. 12(b)(1), arguing, among other things, that the District Court did not have subject matter jurisdiction because petitioners do not have standing. On October 21, 2009, the District Court dismissed petitioners' complaint/petition. The court ruled that the petitioners do not have Article III standing and that therefore the court does not have subject matter jurisdiction. The court found that the petitioners failed to show that they suffered an "injury in fact." It added that petitioners' alleged injury is "only a generally available grievance about government" and "is one they share with all United States citizens." By way of footnote, the court said that even if the petitioners could show that the court had Article III standing, they would not be able to show that the court should exercise jurisdiction because prudential standing concerns would prevent it from doing so. Finally, the court again in a

footnote said that it cannot take jurisdiction of the issue of whether Obama is a "natural born Citizen" and whether Congress has acted constitutionally in its confirmation of Obama for President because the matter is a "political question" which needs to be resolved by Congress. The court said that there simply is no room for judicial review of political choices made by the Electoral College and the Congress when voting for and confirming the President. The court added that the petitioners' remedy against Congress may be found at the voting polls.

In the Third Circuit Court of Appeals

Petitioners invoked the Circuit Court's jurisdiction to review the District Court's order of dismissal under 28 U.S.C. § 1291. On July 2, 2010, the Third Circuit Court of Appeals issued its decision affirming the District Court's dismissal of the case for lack of Article III standing. Appendix A. The court's judgment is Document No.: 0031102204065. The court ordered that Attorney Apuzzo show cause in 14 days why the court should not find him liable for just damages and costs suffered by the respondents in having to defend against what the court considered to be a "frivolous" appeal of the District Court's dismissal of their claims on the ground of Article III standing. App. A. 2a and 8a. The show cause order is Document No.: 003110204089.

The Court found that the petitioners did not establish that they suffered an "injury in fact." App. A, 4a and 8a. It said that the injury that petitioners allege like that of plaintiff, Philip Berg, in *Berg v. Obama*, 586 F.3d 234 (3d Cir. 2009), is not concrete or particularized

enough to satisfy Article III standing. App. A, 5a-6a. It found that these injuries are "too generalized" for Article III courts. App. A, 6a. It added that petitioners' injuries are not "concrete and particularized" because they are "harms that are suffered by many or all of the American people." App. A, 6a. Furthermore, the court said that petitioners' injuries are "generalized grievances" which "are most appropriately handled by the legislative branch." App. A, 7a. The court said that it acknowledges petitioners' "frustration with what they perceive as Congress' inaction in this area, but their remedy may be found through their vote." App. A, 7a. Finally, the court stated that because petitioners failed to show they have standing, it need not address their contention that "the original common law definition of an Article II 'natural born Citizen'. . . is a child born in the country to a United States citizen mother and father." App. A, 8a, n.4.

On July 19, 2010, Attorney Apuzzo filed his response to the court's show cause order. Document No.: 003110221486. On July 22, 2010, the court issued its decision on whether it should impose the damages and costs upon Attorney Apuzzo. The court decided not to impose any damages and costs upon him and discharged its order to show cause. The court order is Document No.: 003110225662.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit Court of Appeals has decided an important question of federal law concerning Article III standing that has not been but should be settled by this Court

The court has held that the citizen petitioners do not have Article III standing to enforce the Article II, Section 1, Clause 5 "natural born Citizen" clause against all respondents under the Fifth Amendment due process right to life, liberty, safety, security, tranquility, and property, and against Congress[1] also under the Fifth Amendment procedural due process and equal protection clause, and the Twentieth Amendment.

A. Standing and subject matter jurisdiction are important questions of federal law

One important question that this Court should address is whether United States citizens such as the petitioners have standing to enforce these types of claims. There is little doubt that this Court attaches great national importance to the issues of standing and jurisdiction. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 470 (1982) (granting certiorari because of the "unusually broad and novel view of standing to litigate a substantive [constitutional] question in the federal courts adopted by the Court of Appeals.); *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct.

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1. Petitioners have sued, among others, the United States, Congress, The Senate, and The House of Representatives. We will refer to these respondents collectively as "Congress."

1438 1447 (2007) ("Notwithstanding the serious character of [the respondent's] jurisdictional argument and the absence of any conflicting decisions construing [the Clean Air Act], the unusual importance of the underlying issue persuaded us to grant the writ").

B. The Court should exercise its supervisory powers regarding standing and subject matter jurisdiction

Connected to the importance of standing and jurisdiction that this Court has recognized is the related issue of the Court exercising its supervisory powers over all courts in the land. This is a case in which the Court can exercise such supervisory power on the issue of standing. *See Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) (recognizing the Courts supervisory authority and "pure error-correcting functions in federal litigation"); *Bruner v. United States*, 343 U.S. 112 (1952) (involved supervision regarding the jurisdiction of federal courts). The "supervisory power" function of the Court in this case takes on additional significance because of all the other important reasons that we express herein regarding why the Court should grant certiorari.

To date, many lower courts throughout the country have denied any plaintiff standing to file an action under the Article II "natural born Citizen" clause.[2] But this Court has never decided whether a citizen has standing

2. Not one court in any jurisdiction has held that a citizen, voter, or oath taker has standing to make such claims. *See, e.g.*, *Barnett v. Obama*, No. 09-0082, ___ F. Supp. 2d ___, 2009 WL (Cont'd)

to enforce Article II's "natural born Citizen" clause[3] and to bring claims against Congress for its failure to comply with its constitutional duties under the Twentieth Amendment. There is no Supreme Court decision on whether a citizen has standing to enforce Article II's "natural born Citizen" clause by requesting the court, within the factual and legal context of the case or controversy presented by the *Kerchner* case, to declare the meaning and application of that clause as it applies to Obama or any other presidential candidate, president-elect, or sitting putative president, and issue injunctive

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(Cont'd)

3861788, at *4-*6 (C.D. Cal. Oct. 29, 2009), *recons. denied* (Dec. 4, 2009), appeal pending (9th Cir.); *Patriot's Heart Media Network, Inc. v. Soetoro* , No. 1:09-mc-00442-RCL (D.D.C. Sept. 10, 2009); *Hamblin v. Obama* , No. 09-17014, 2009 WL 2513986 (D. Ariz. Aug. 14, 2009); *Cook v. Good* , 2009 WL 2163535 (M.D. Ga. July 16, 2009), appeal dismissed, No. 09-14698-CC (11th Cir. Nov. 24, 2009); *Essek v. Obama* , No. 08-379-GFVT (E.D. Ky. Jan. 15, 2009); *Dawson v. Obama* , 2009 WL 532617 (E.D. Cal. Mar. 2, 2009); *Cohen v. Obama*, No. 08-2150, 2008 WL 5191864, at *1 (D.D.C. Dec. 11, 2008), *aff'd*, *Cohen v. Obama*, 332 F. App'x 640 (D.C. Cir. Sept. 8, 2009) (per curiam), *reh'g denied* (D.C. Cir. Nov. 25, 2009), *reh'g en banc denied*, slip copy (D.C. Cir. Nov. 25, 2009); *Strunk v. N.Y. State Bd. of Elections* , No. 1:08-cv-04289-ARR-LB (E.D.N.Y. Oct. 30, 2008), *appeal dismissed*, No. 08-5422 (2d Cir. Nov. 14, 2008); *Berg v. Obama* , 574 F. Supp. 2d 509 (E.D. Pa. Oct. 24, 2008), *aff'd*, 586 F.3d 234 (3d Cir. Nov. 12, 2009); *Robinson v. Bowen* , 567 F. Supp. 2d 1144, slip copy (N.D. Cal. Sept. 16, 2008); *Hollander v. McCain* , 566 F. Supp. 2d 63 (D.N.H. July 24, 2008).

3. The Supreme Court has refused to grant stay applications or writs for certifications in at least 11 cases. We can speculate that, among other matters, issues of ripeness, redressability, and identity of parties could be among the reasons for the Court's refusal to grant any relief.

and mandamus relief based on that declaration. Under the same factual and legal circumstances, there also is no Supreme Court precedent on whether a citizen has standing to bring an action against Congress and other government officials in which he contends they violated their Twentieth Amendment duties and powers by failing to confirm before accepting his electoral votes that the President-Elect met the Founders' and Framers' definition of an Article II "natural born Citizen" and that he was born in the United States and by failing to protect the petitioners regarding their concern over Obama's citizenship status as they protected others who were concerned with McCain's status.

The answers to these questions have broad implications not only for civil rights plaintiffs looking for a remedy in the judicial branch of government but for the nation as a whole. Whether the petitioners have standing to enforce this clause and the Twentieth Amendment is vitally important to our constitutional republic. By so finding, the Circuit Court has not only decided that petitioners do not have standing but has also decided not to address the vitally critical constitutional questions that lie in the merits of petitioners' case. The merits of petitioners' claims go to the questions of whether Obama is an Article II "natural born Citizen; " whether he has conclusively proven that he is a Fourteenth Amendment born "citizen of the United States;" whether Obama violated petitioners' Fifth Amendment due process rights to life, liberty, safety, security, tranquility, and property and rights retained by them under the Ninth Amendment by failing and refusing to conclusively prove that he is an Article

II "natural born Citizen;" whether Congress violated petitioners' Fifth Amendment due process rights to life, liberty, safety, security, tranquility, and property and rights retained by them under the Ninth Amendment by violating its Twentieth Amendment constitutional duty to petitioners when it confirmed President-Elect Obama who is not a "natural born Citizen" and who has not even conclusively proven that he is a born "citizen of the United States" under the Fourteenth Amendment; whether Congress violated petitioners' procedural due process rights under the Fifth Amendment, Twentieth Amendment and 3 U.S.C. Sec. 15; and whether Congress violated petitioners' rights to equal protection under the Fifth Amendment.

C. The Circuit Court's decision on standing implicates the questions of the meaning and application of the "natural born Citizen" clause and Congress' duty under the Twentieth Amendment to enforce it which are important constitutional questions

The merits of petitioners' claims involve the meaning and application of Article II "natural born Citizen" clause and the constitutional duty of Congress under the Twentieth Amendment to properly enforce that clause. While the United States Supreme Court has directly decided what is the meaning of a "citizen of the United States," and has provided in dicta the definition of an Article II "natural born Citizen," it has never decided a case in which it applied the meaning of a "natural born Citizen" to the question of whether a President Elect meets that criteria in order to be eligible to be President.

1. Having a person sit as President and Commander in Chief of the Military who is not a "natural born Citizen" puts the national security of the United States vitally at risk

Petitioners' claims involve the national security of the United States which is now vitally at risk. Because both the District Court and the Court of Appeals found that petitioners do not have Article III standing, those courts never decided the underlying merits of petitioners' case which involve the questions of whether putative President Obama has conclusively proven that he is not only a "citizen of the United States" by being born in Hawaii but also an Article II "natural born Citizen." The issue of who is a "natural born Citizen" has great implications for our national security. This case is about whether our nation should allow a precedent created by a popular vote to stand that makes it possible for an individual who is born with dual and conflicting foreign allegiance to become President and Commander in Chief of the Military. This case is about whether we should allow a critical question such as the meaning of a "natural born Citizen" to be answered by the political parties and the people through their act of voting at the polls or by the judicial branch of government which is not only constitutionally empowered to answer such a question but also uniquely qualified to do so. The answer to this question has direct implication not only for the protection to life, liberty, and property to which the petitioners are entitled under the Fifth Amendment but also for the national security of the United States, for who is allowed to wield the all and singular powers of the President and Commander in Chief of the Military

is of vital importance to the preservation and survival of the constitutional republic. The purpose the Framers included the "natural born Citizen" clause in Article II was to provide a "strong check" on foreign influence making its way into our government and specifically in the Office of President and Commander in Chief of the Military. *See* July 25, 1787, letter of John Jay to General George Washington ("Permit me to hint, whether it would not be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the american army shall not be given to, nor devolve on, any but a natural *born* Citizen (emphasis in the original) (found at http://thomas.loc.gov). If the President and Commander in Chief is ineligible for those offices, both our civilian and military sector need to know that as soon as possible. The President is the Commander in Chief of our military forces. Whether he is legitimate is also vital in maintaining the proper chain of command in our military and in giving legality to all military orders that emanate from him.[4] Since the President signs all acts passed by Congress into law, it is vitally important that the President be legitimately in power so as to give those laws domestic and international legality. Hence, the

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4. We are asking the Court to take judicial notice under Fed. R. Evid. 201(d) of an affidavit filed by Lt. Gen. Thomas G. McInerney (retired) in the court marital proceeding of Lt. Col. Terrence Lakin who is currently in court martial proceedings for his refusal to obey orders and to be deployed on the ground that Obama has yet to show that he is a "natural born Citizen." http://court-martial-ucmj.com/category/lakin/. The affidavit may be accessed and read at http://randysright.files.wordpress.com/2010/09/affidavit of lt gen mcinerney1.pdf.

claims being made by petitioners directly and substantially implicate the national security of the United States.

2. The rule of law needs to be protected

The Court should also grant the petition because we need to protect the rule of law. The sovereign power in our constitutional republic lies with the people and the Constitution they established to limit the power of the Federal government. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (says the people are sovereign in our constitutional republic) (superseded by statute as stated in *FMC v. S.C. State Ports Auth.*, 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002). That sovereignty can be protected only by the rule of law. The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a legal right. *Marbury v. Madison*, 1 Cranch 163 (1803). To deny standing is to close the court house doors to a litigant who seeks justice under the rule of law. The Court's finding that petitioners have standing is to find in favor of the rule of law.

Both lower courts said that while they understand how petitioners are frustrated with Congress not acting on their request for investigation and action, their only remedy is at the polls. App. A, 7a. Hence, we can see that even the court concedes that to deny petitioners standing is to allow such critical questions to be decided by political parties and voting majorities rather than the rule of law. Not only is such a proposed remedy both

inappropriate and insufficient, but its suggestion understates the gravity to petitioners of the consequences of denying them any right to bring their claims to a court of law. The rule of law does not allow that the will of the people or the popular vote should determine the meaning of the "natural born Citizen" clause and that Congress should defer to that will on such vital constitutional questions. Rather, only the judicial branch of government can provide that meaning and by so doing will maintain the rule of law in our nation on this vitally important question. It is only by allowing litigants to bring claims to the courts that the courts can enforce and preserve the rule of law. Hence, whether or not a citizen has standing to bring an important constitutional challenge against his or her government is of utmost national importance, for the action also goes to protecting and preserving the rule of law.

3. The Supreme Court should grant review so as to maintain the proper balance of power between the three branches of government in our constitutional republic

The judiciary plays a vital role in our constitutional republic. It is the judiciary that keeps the other two branches in check so they do not usurp power that is not given to them by the Constitution and violate the rule of law. Allowing the other two branches of government to operate outside the Constitution and not providing a litigant access to the judiciary to redress such wrongs can only put the balance of power in jeopardy ultimately undermines the foundation of the constitutional republic. *See Hamdan v. Rumsfeld*, 546

U.S. 1002, 126 S.Ct. 2749, 2759 (2006) (certiorari was granted because "trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure").

4. Whether or not the President and Commander in Chief is legitimately sitting in those offices impacts the nation's foreign policy

The President has great powers under the Constitution to engage in and impact the nation's foreign policies. He is the Commander in Chief of the Military which gives him great powers to execute war. He is in daily involvement with foreign nations in a sundry of important international issues. Under Article II, Section 2, Clause 2, the President also negotiates and signs treaties and appoints ambassadors and other public ministers and consuls. Hence, the President's executive powers have a profound impact on the foreign policy of the nation. Being nations of laws and to accept his actions as legitimate, the United States and foreign nations need to be assured that the President and Commander in Chief is operating within the bounds of the United States Constitution and laws. *See American Ins. Ass'n v. Geramendi*, 539 U.S. 396, 401 (2003) (certiorari granted because of the important foreign policy implications involved); *Christopher v. Harbury*, 536 U.S. 403, 412 (2002) (same);

5. The nation needs a definition of "natural born Citizen" for future presidential and vice presidential elections

What is the correct meaning of the "natural born Citizen" clause is also critically important to future presidential and vice presidential elections. Over the years there has been much debate about the meaning of the clause but no definite resolution yet by the Supreme Court. Even though we are already over 20 months into Obama's term of office, the question has not been resolved. Given past precedent, Obama will most likely run for a second term and the nation will be faced with the same issue. Given the amount of children born in the United States to alien parents (one or two), naturalized citizens, non-citizen permanent residence, and illegal aliens who reside in our nation, this issue can easily repeat in future elections. Now is the opportune time for the Supreme Court to give the nation that much-needed definition of what an Article II "natural born Citizen" is.

II. The Third Circuit Court of Appeals erred in concluding that petitioners do not have standing to bring their claims and the Court should exercise its error-correction function to correct such error

Before a federal court will take subject matter jurisdiction over a plaintiff's complaint, that party must adequately demonstrate that he or she has Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Respondents have argued and the District Court and

Court of Appeals have found that petitioners lack standing to bring their claims. They both found that petitioners do not have Article III standing because they have failed to show they suffered an injury in fact. We submit that the Circuit Court committed error in so finding and that this Court should grant certiorari on this basis so that it can exercise its error-correction function. *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136 (1968) (certiorari was granted because "these [erroneous] rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the anti-trust policy of the United States") So too here, the Circuit Court's erroneous ruling on standing virtually precludes any means to enforce Article II's "natural born Citizen" clause.

A. The standing standard

The Supreme Court in *Lujan, supra*, provided the necessary requirements a plaintiff must show to establish standing: (1) an "injury in fact" which is an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical;'" (2) a causal connection between the injury and the conduct complained of, i.e, the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court;" and (3) it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* at 560-561. By particularized, the Court meant that the injury must affect the plaintiff in a personal and

individual way. *Id.* at 561. Petitioners did adequately show that they do present an Article III "case" or "controversy" in that they satisfy each of the constitutional requirements to establish standing.

B. Application of the standard

1. Petitioners have suffered an injury in fact

a. The injury is concrete

The Circuit Court agreed that the factual allegations of the complaint/petition are to be accepted as true and are to be interpreted in a light most favorable to the plaintiffs. App. A, 3a-4a. Hence, the Court would have accepted as true plaintiffs' well-plead allegations that Obama has not yet conclusively proven that he was born in Hawaii and that he is not an Article II "natural born Citizen." The Court would also have to accept plaintiffs' well-plead allegations that Congress failed to properly vet and investigate Obama under its Twentieth Amendment powers, and that former Vice President and Senate President, Dick Cheney, and current Speaker of the House, Nancy Pelosi, were complicit in that failure. The respondents neither in the District Court nor on appeal have yet to dispute plaintiffs' allegations that Obama does not meet the definition of an Article II "natural born Citizen" and that he has not yet conclusively proven that he was born in Hawaii. No court in the United States that has rendered any decision on the Obama eligibility issue has granted to any plaintiff any discovery which would show that these allegations are not true. Accepting these allegations as true is important because these accepted facts go to the

plaintiffs' establishing an injury in fact and therefore standing.

The threat to petitioners' life, liberty, safety, security, tranquility, and property is actual and concrete rather than merely conjectural or hypothetical. The Declaration of Independence recognizes these rights as "unalienable" and as having been endowed upon an individual by his or her "Creator." The Constitution recognizes these rights not as being abstract or theoretical rights but rather as concrete and real and needing protection from government abuses. It recognizes these rights as the essence of a person's being. Petitioners sued Obama after he assumed the great and singular powers of the Executive. Obama was not a mere candidate with no power. Obama has had and continues to have executive and military power to harm the petitioners. He actually exercises those powers on a daily basis. Petitioners cannot rely on Obama, who was born with dual and conflicting allegiances to protect them as a "natural born Citizen" would. The United States Supreme Court has recognized the problems presented by dual nationality and has stated that dual nationality is a "status long recognized in the law" and that a person with such dual nationality "may have and exercise rights of nationality in two countries and be subject to the responsibilities of both." *Kawakita v. United States*, 343 U.S. 717 (1952). But because Obama has yet to and because he cannot conclusively prove that he is an Article II "natural born Citizen" because of his conflicting natural allegiance and loyalty, plaintiffs are not constitutionally expected to nor do they trust him to protect their life, liberty, safety, security, tranquility, and property as would a President and Commander in

Chief of the Military who is a "natural born Citizen." Petitioners must therefore be allowed to challenge Obama in order to protect these concrete rights.

b. The injury is particularized

The Constitution expressly and strictly limits the power of the federal government. It also recognizes and protects on an individual basis a person's unalienable individual rights to life, liberty, and property, which included safety, security, and tranquility. Petitioners, as citizens of the United States, have a vested legal right under the Fifth Amendment to the Constitution to life, liberty, safety, security, tranquility, and property. The Ninth Amendment further enforces those rights and others against respondents. Petitioners are therefore the objects of this constitutional protection and personally and particularly entitled to these rights and protection that they offer.

The requirement that a person be a "natural born Citizen" to lead a constitutional republic both in its civil and military capacity is based on a policy decision made by the Founders and Framers that itself was based on what they perceived to be the consequences to the survival, preservation, and protection of not only that republic but every one of its citizens should that person not have love, fidelity, and allegiance only to the nation and to every one of its citizens from the moment of his or her natural birth. It is this decision by the Founders and Framers which gives the individual petitioners the constitutional right to bring a legal action in which they ask, in default of the executive and legislative branches of government and the political majorities doing so, the

judiciary to protect their individual right to protect their unalienable rights to life, liberty, safety, security, tranquility, and property as guaranteed to them by the Declaration of Independence and the Constitution.

The petitioners each have an unalienable right to life, liberty, safety, security, tranquility, and property. The government has a constitutional obligation to protect those rights pursuant to the very reason why the People constituted their government during the Founding and under the Fifth Amendment due process clause. This is the constitutional protection which the government owes to each of the petitioners. Given the Founders' and Framers' policy decision to require the President to be a "natural born Citizen," petitioners are not expected to and have not and will not receive that protection from a person who, not being an Article II "natural born Citizen," is an illegal and illegitimate President and Commander in Chief of the Military. Neither the District Court nor the Court of Appeals addressed this argument in their decisions that plaintiffs do not have standing. But this is the central standing argument that we made in these two courts. The injury that is alleged in this argument is critical to plaintiffs' standing to bring their claims against the respondents, for lack of protection from their President and Commander in Chief to which each particular citizen petitioner is entitled under our constitutional covenant between the petitioners and the Government as conceived by the Founders and Framers is more than sufficient to defeat a motion to dismiss for lack of standing in that it shows that the citizen petitioners have each suffered an injury in fact which is both concrete and particularized and which gives them standing and

under the Fifth Amendment due process clause a right to seek redress for that injury in the courts.

Courts have also created the doctrine of prudential standing which is not an Article III "Case or Controversy" requirements but rather a judicial policy consideration. *Flast v. Cohen*, 392 U.S. 83, 92 (1968) ("confusion has developed as commentators have tried to determine whether *Frothingham* establishes a constitutional bar to taxpayers suits or whether the Court was simply imposing a rule of self-restraint which was not constitutionally compelled"). Under prudential standing, the judiciary seeks to avoid deciding question of broad social impact where no individual rights would be vindicated and to limit access to the courts to persons best suited to assert particular claims. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). Not addressing the District Court's finding that petitioners also lack prudential standing, the Circuit Court concluded that petitioners do not have Article III standing. App. A, 4a. But the court's conclusion that petitioners fail to establish Article III standing because they present "generalized grievances" "that are suffered by many or all of the American people" and which are "most appropriately handled by the legislative branch" (App. A, 7a) is an application of prudential standing rather than Article III constitutional standing. *See United States v. Richardson*, 418 U.S. 166, 173-76 (1974) (the individual may not litigate generalized grievances shared by a large group of individuals). Prudential standing is grounded to a great degree on political considerations. It is very amorphous since it is based on the court's case-by-case view of what it perceives to be its role in our tripartite federalist

system, its self-restraint within that vision, and what it perceives to be sound public judicial policy. In *Federal Election Commission v. Akins*, 524 U.S. 11, 25 (1998), the Court held that the injury "is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts." In this case, we do not have any Congressional statute granting petitioners standing. But nevertheless, petitioners' injuries are sufficiently concrete and specific to them that it does not matter that other Americans may also be damaged. *See Lujan*, 504 U.S. at 555, 563 (it does not matter that others are also injured provided that plaintiffs are "among the injured") (*accord*, Kennedy, J. and Stevens, J., concurring, at 581).

c. The injury is actual or imminent

Obama is currently exercising executive power. He has exercised it, continues to exercise it, and will do so into the future. Hence, the lack of protection injuries that he is causing plaintiffs are actual and on going and those to occur in the future are imminent. Based on all of the foregoing, we can see that petitioners suffered an injury in fact.

2. There is a causal connection between the injury and the conduct of which they complain

Petitioners have established a causal link between the injury they suffered and respondents' conduct. The respondents have not contested this issue either in the District Court or in the Court of Appeals.

3. It is likely and not merely speculative that their injuries will be redressed by a favorable court decision

Finally, it is more than likely, not merely speculative, that petitioners' injuries would be redressed by the declaratory, injunctive, and mandamus relief they are requesting. While respondents have not contested this issue, we will still address it. All necessary parties, including Congress, are before the Court and it can therefore give petitioners meaningful relief.

a. Congress cannot define a "natural born Citizen"

Congress cannot define a "natural born Citizen," for under Article I, Section 8, Clause 5 it only has power to make uniform the laws of naturalization which does not include defining an Article II "natural born Citizen." If the clause is not already defined by the Constitution or by the United States Supreme Court, the Constitution does not give Congress the authority to define the meaning of a "natural born Citizen." While Congress can surely apply the "natural born Citizen" clause in a way that is consistent with its historical meaning, Congress cannot define anew the "natural born Citizen" clause for the purpose of declaring a president-elect or sitting putative president either eligible or ineligible for that office. Only the Court can define the "natural born Citizen" clause and give that definition to Congress for it to apply when exercising its constitutional duty under the Twentieth Amendment to confirm a president-elect's qualifications to hold that office. The Court therefore has the right and authority to declare that Obama failed

to qualify by January 20th under the Twentieth Amendment and that Congress should fill the office pursuant to the Constitution and laws passed pursuant thereto. Once the Court declares what the petitioners' and respondents' rights are, Congress can take appropriate action to effectuate what the Court declares.

b. The executive cannot define a "natural born Citizen"

The Executive cannot resolve the question, for it involves the chief executive himself, the President of the United States. This is not a case like *Lujan* where the wrong alleged by petitioner is best handled by the Executive Branch of government. Petitioners are not challenging any government agency action or requesting anything which can be perceived as the court's interference with the executive's constitutional authority to "take Care that the Laws be faithfully executed" (Article II, Section 3) but rather the failure of Obama as the President-Elect (but still a private person) to satisfy the "natural born Citizen" clause and then as the Executive to satisfy the clause and protect the plaintiffs' Fifth Amendment rights to life, liberty, safety, security, tranquility, and property by refusing to be bound by the meaning and intent of the clause. This case does not involve any Congressional citizen-suit statute which unduly interferes with executive power and thereby violates Article III by unlawfully granting standing to citizens who are not able to sufficiently allege facts which show they have standing.

c. The political parties and the popular vote cannot define a "natural born Citizen"

The constitutional issue also cannot be decided by the political parties and a voting majority. Our nation is ultimately guided by the Constitution and the rule of law, not by majority rule. Allowing the political parties and the voting majorities to decide constitutional issues would be tantamount to amending the Constitution without going through the amendment process prescribed by Article V of the Constitution and abandoning the basic principles of republican government.

d. Only the judiciary can define a "natural born Citizen"

Only the judiciary can resolve this constitutional crisis. Petitioners sued Obama when he was still the President-Elect and after he was sworn in and became President. Hence they sued him before he acquired the immunities of the Office of President and after executive power putatively vested in him. As a private person, Obama cannot claim that he may be removed from office only through impeachment by Congress under Article I, Section 2 and 3, for the executive powers of the president along with removal only by impeachment that come with it had yet to legitimately vest in him at that moment in time.[5] The same is true for the time after

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5. Leaving those functions to the House and Senate, respectively, the Constitution does not allow the judiciary to initiate and prosecute an impeachment of any sitting president. The Framers gave those powers to the legislature and expected it to exercise its political judgment on whether to initiate and prosecute such proceedings.

Obama took the oath of office, for Obama's title to the Presidency is void *ab initio* and should therefore never have vested in him from the beginning. Rather, Congress can resort to its powers under the Twenty-Fifth Amendment to remove the putative sitting President from office when he is unable to constitutionally exercise his executive powers. Obama's inability to hold the Office of President because he is not an Article II "natural born Citizen" is his lack of constitutional authority to do so.

If neither Congress nor the Executive branches of government will give the petitioners that protection to which the Constitution entitles them, they should have access to the courts to be able to protect and vindicate their own rights to that protection. This right to access to the courts is more critical when both the executive and legislature are acting in concert to deprive the petitioners of their right to this protection. Since Obama has already been sworn in, it could be argued that only Congress has jurisdiction over the question of whether he is a "natural born Citizen." But what happens when Congress also refuses to perform its constitutional duty under the Twentieth Amendment to make sure that only a "natural born Citizen" is given the great and singular powers of the Office of President and Commander in Chief of the Military? Surely the Constitution would not leave someone like the petitioners without any remedy to protect the same rights which the Declaration of Independence and the Constitution recognize as their unalienable rights to life, liberty, and property. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (where there is a right there is a remedy). Only the Supreme Court can therefore decide

the issue of standing, define a "natural born Citizen," and determine whether the current sitting putative President is legitimate.

C. *Berg* is distinguishable

With the other cases the court cited not being dispositive of the issue of whether petitioners have standing, the Court of Appeals cited and relied heavily upon *Berg v. Obama*, 586 F.3d 234 (3d Cir. 2009) for its holding. But *Berg* presented a factual and legal scenario much different from that of the petitioners. While the *Berg* action was filed by a voter against Obama as a mere candidate for office, the *Kerchner* case was filed not by voters but by citizens (all the petitioners) and military (Kerchner) and law enforcement (Nelsen) oath takers after Obama became President-Elect but before and after he was sworn in as President. Hence, *Kerchner* does not suffer from lack of ripeness as did *Berg*. *Kerchner* includes Congress with due process and equal protection claims against it, a necessary party for redressability, as a defendant and *Berg* did not. Because of its premature filing, *Berg* presented political question and separation of powers problems, but *Kerchner* does not. *Berg* also presented First Amendment problems in that plaintiff sought to stop a candidate from running for political office because of his citizenship status. But the *Kerchner* case does not have that problem. Of critical importance, *Berg* did not make a Fifth Amendment protection claim but *Kerchner* does. Finally, *Berg* did not argue that Obama is not eligible because he does not meet the original law of nations and common law definition of a "natural born Citizen" which our briefs and record in the Circuit Court show is a child born in

the country to a citizen mother and father. The fact that the *Berg* case suffered from all those factual and legal defects caused him not to be able to show standing. But because the *Kerchner* case does not have those same defects, the petitioners are able to show they have standing.

The courts should apply standing to refuse taking jurisdiction of a case only in the most clearest of cases so as not to unreasonably deny a litigant's due process right to vindicate his or her constitutional rights in a court of law. *Cohens v. Virginia*, 19 U.S. 264 (1821). If plaintiffs do not present a legitimate case or controversy under Article III, then the presidential eligibility clause has effectively been nullified, not by a constitutional amendment but rather by the court-created rule of standing which plaintiffs have in any event shown they adequately satisfy. Indeed, the courts should and must take jurisdiction of this case. *See Flast v. Cohen*, 392 U.S. 83 (1968) (standing found); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (same); *United States v. SCRAP*, 412 U.S. 669 (1973) (same); *Linda R.S. v. Richard D*, 410 U.S. 614 (1973) (same); *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230-231 (1986) (same); *Federal Election Commission v. Akins*, 524 U.S. 11, 25 (1998) (same); and *Massachusetts v. EPA*, 549 U.S. 497 (2007) (same).

III. Obama has not conclusively proven that he is an Article II "natural born Citizen"

While the lower courts have not decided the merits of petitioners' claims, we are respectfully requesting that because petitioners have shown they have standing and

that the lower courts should have taken jurisdiction over these merits, their vital importance to the petitioners and to the protection and preservation of our constitutional republic, and the need for "swift review" by this Court, the Supreme Court exercise its "before . . . rendition of judgment" discretion under 28 U.S.C. Sec. 1254(1), 28 U.S.C. Sec. 2101(e), and Rule 11 and also decide those merits. *See* Chief Justice Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A.J. 443, 444 (1976) (the Supreme Court grants expedited review when circumstances warrant that action).

Article II, Section 1, Clause 5 provides:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

Under this clause, Obama must prove, among other things, not only that he is a "citizen of the United States" but also that he is a "natural born Citizen" in order to be eligible to assume and hold the Office of President and Commander in Chief. We submit that Obama if born in Hawaii may be a Fourteenth Amendment born "citizen of the United States," but is not and cannot be an Article II "natural born Citizen" which disqualifies him from holding those offices. An Article II "natural born Citizen" is not only a "citizen of the United States" under the Fourteenth Amendment by being born in and subject

to the jurisdiction of the United States but also born to citizen parents (meaning both mother and father). Given this law of nations and common law definition, a would-be president must be born to citizen parents and be born in the United States (or its equivalent). Emer de Vattel, *The Law of Nations, or Principles of the Laws of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, bk. 1, c. 19, sec. 212 (original French in 1758 and first English in 1759, and other subsequent French and English editions). In our briefs to the Circuit Court and in the record there (filed on 1/19/2010, 3/23/2010, and 4/2/2010) we provided legal support for this argument. Should the Court grant certification and at the Court's request, we will fully brief the issue of the meaning of an Article II "natural born Citizen."

There is no factual dispute that Obama's father was not a United States citizen when Obama was born. In his two books, *Dreams from My Father* (1995) and *The Audacity of Hope* (2006), Obama states that his father was Barack Hussein Obama and that he was a British subject at the time Obama was born who then became a citizen of Kenya when that country gained its independence from Great Britain in 1963. Additionally, according to what has been publicly stated about Obama's father, he at no time became a citizen of the United States. These facts have also been confirmed on FactCheck.org web site and Obama's web site, Fight the Smears. The Court can take judicial notice of these facts under Fed. R. Evid. 201(d). Obama has also yet to conclusively prove with a 1961 contemporaneous birth certificate that he was born in Hawaii. *See Vassilios v. Kennedy*, 95 F.Supp. 630 (D.C.Cir. 1961) ("Necessarily, a record of birth contemporaneously made by

governmental authority in official records [such as a "contemporaneous birth certificate" when there is no indication that one is not readily available] would be most conclusive evidence of birth").

IV. Congress violated the Twentieth Amendment

Under the Twentieth Amendment, Congress' power to confirm a president-elect is limited to one who qualifies under Article II, Section 1, Clause 5. Congress has a constitutional duty under this amendment to only confirm the electoral votes of a President-Elect who is qualified for that office which means that he or she must, among other things, be an Article II "natural born Citizen." Here, Congress failed to properly exercise this duty and thereby allowed Obama to be confirmed to the Office of President when he is not and cannot be an Article II "natural born Citizen" and in any event, when he has to this day failed to conclusively prove that he is even a "citizen of the United States" by birth in the United States.

V. Congress violated petitioners' equal protection to life, liberty, safety, security, tranquility, and property under the Fifth Amendment

Petitioners are challenging the failure of Congress to protect their Fifth Amendment rights to life, liberty, safety, security, tranquility, and property by failing to be bound by the meaning and intent of Article II's "natural born Citizen" clause and to provide that protection equally to them as they did to other similarly situated persons who were concerned with John McCain's "natural born Citizen" status. In investigating

and confirming McCain's status but refusing to do the same for Obama, Congress violated petitioners' rights to equal protection of their life, liberty, safety, security, tranquility, and property under the Fifth Amendment.

VI. Justice Sonia Sotomayor and Justice Elena Kagan should recuse themselves from having any involvement in this case

We respectfully request that pursuant to 28 U.S.C. Sec. 455(a) and (b)(4), Justice Sonia Sotomayor and Justice Elena Kagan should recuse themselves from having any involvement or deciding any issues in petitioners' petition to the Supreme Court in which they are challenging the legitimacy of putative President Obama, the government official who appointed them to their offices. The validity of their appointments can be questioned should Mr. Obama be found not eligible to be President which could cause them to lose their appointment in which they have a financial interest.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JULY 2, 2010

No. 09-4209

CHARLES F. KERCHNER, JR.; LOWELL T. PATTERSON; DARRELL JAMES LENORMAND; DONALD H. NELSEN, JR.,

Appellants

v.

BARACK HUSSEIN OBAMA, II, President Elect of the United States of America, President of the United States of America, and Individually; UNITED STATES OF AMERICA; UNITED STATES CONGRESS; UNITED STATES SENATE; UNITED STATES HOUSE OF REPRESENTATIVES; RICHARD B. CHENEY, President of the Senate, Presiding Officer of Joint Session of Congress, Vice President of the United States and Individually; NANCY PELOSI, Speaker of the House and Individually

On Appeal from the United States District Court
for the District of New Jersey.
(D.C. Civil No.1-09-cv-00253).
District Judge: Hon. Jerome B. Simandle.

Submitted Under Third Circuit LAR 34.1(a)
June 29, 2010

Before: SLOVITER, BARRY and HARDIMAN, *Circuit Judges.*

Appendix A

OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Charles F. Kerchner, Jr., Lowell T. Patterson, Darrell J. LeNormand, and Donald H. Nelsen, Jr. (hereafter "Appellants") filed suit in the United States District Court for the District of New Jersey, alleging that President Barack Obama is ineligible to hold his Office as President. They rely on Article II, Section 1, Clause 4 of the United States Constitution which provides that "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President. . . ." U.S. Const., art. II, § 1, cl. 4.[1] Appellants challenge the District Court's order dismissing their complaint. We will affirm the order of dismissal and direct Appellants' counsel to show cause why just damages and costs should not be imposed on him for having filed a frivolous appeal.

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1. There is a dispute, among courts and commentators, as to whether the provision known as the "Natural Born Citizen" clause should be cited as clause 4 or clause 5 of Article II, § 1 of the Constitution. *Compare Hollander v. McCain*, 566 F. Supp. 2d 63, 65 (D.N.H. 2008) (citing the provision as clause 4), *Rhodes v. MacDonald*, No. 4:09-CV-106, 2009 U.S. Dist. LEXIS 84743,2009 WL 2997605, at *1 n.1 (M.D.Ga. Sept. 16, 2009) (same), *and* Gerard N. Magliocca, *Constitutional False Positives and the Populist Movement*, 81 NOTRE DAME L. REV. 821, 874 (2006) (same), *with Mathews v. Diaz*, 426 U.S. 67, 78 n.12, 96 S. Ct. 1883, 48 ' Ed. 2d 478 (1976) (citing the provision as clause 5), *and* Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. Pa. L. REV. 1025, 1051 (2010) (same). In any event, the parties agree as to the substance of the Natural Born Citizen clause, and we use the same citation as we used in *Berg v. Obama*, 586 F.3d 234, 237 n.1 (3d Cir. 2009).

Appendix A

I.

Appellants, seeking to compel President Obama to "conclusively prove[ ]" that he is eligible to serve as President, Appellants' Br. at 6, named as defendants President Obama, the United States of America, the United States Congress, the United States Senate, the United States House of Representatives, former Vice President and President of the Senate Richard Cheney, and Speaker of the House Nancy Pelosi (hereafter "Appellees"). Appellants allege that President Obama violated their rights under the Fifth and Ninth Amendments when he assumed office without "conclusively" proving that he is eligible for the presidency and that the legislative branch violated Appellants' right under the Petition Clause of the First Amendment when Appellants' request to investigate the President's birthplace and citizenship was ignored. Appellants also assert claims under the Fifth and Twentieth Amendments against Congress, former Vice President Cheney, and Speaker Pelosi, for failing to "properly vet and verify" Obama's citizenship. Appellants' Br. at 10. They moreover bring an equal protection claim on the ground that Congress "fully investigated . . . whether Republican Presidential candidate John McCain is an Article II 'natural born Citizen,'" but made no such inquiry as to President Obama. Appellants' Br. at 10-11.

At this procedural posture, we must "accept all factual allegations as true, construe the complaint in the light most favorable to [Appellants], and determine

whether, under any reasonable reading of the complaint, [Appellants] may be entitled to relief." *Byers v. Intuit, Inc.*, 600 F.3d 286, 291 (3d Cir. 2010) (quoting *Grammar v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 523 (3d Cir. 2009)). Nonetheless, "a complaint must . . . 'state a claim . . . that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

The District Court concluded that Appellants lacked Article III standing.[2] *See Kerchner v. Obama*, 669 F. Supp. 2d 477, 479 (D.N.J. 2009). We agree. It is axiomatic that standing to sue is a prerequisite to Article III jurisdiction. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). This constitutional mandate requires that Appellants show, inter alia, an "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "An 'injury in fact' is 'an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.'" *Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009) (quoting *Lujan*, 504 U.S. at 560).

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2. Appellants invoked the District Court's jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3)-(4), 1346(a)(2), 1361, 1651(a), and 2201(a)-2202. We have jurisdiction to review the District Court's order of dismissal under 28 U.S.C. § 1291.

Appendix A

The appeal in *Berg* presented us with a claim similar to the one here, in which the plaintiff challenged President-elect Obama's eligibility to run for and serve as President. The district court in that case dismissed the suit on standing grounds because "the alleged harm to voters like [the Plaintiff] stemming from [Obama's] failure to satisfy the eligibility requirements of the Natural Born Citizen Clause is not concrete or particularized enough to satisfy Article III standing. . . ." *Id.* at 238 (quotation, citation and original internal brackets and ellipses omitted). This court affirmed the order dismissing the suit, agreeing that "a candidate's ineligibility under the Natural Born Citizen Clause does not result in an injury in fact to voters." *Id.* at 239 (quotation and citation omitted).

In this case, Appellants seek to respond to the District Court's dismissal on standing grounds by claiming that they have "suffered individual injuries . . . not shared by all members of the public," Appellants' Br. at 51, because they voted in the November 4, 2008 presidential election and because they, unlike the majority of voters, "perceive themselves to have suffered [a] violation of their constitutional rights regarding Obama's eligibility to hold office." Appellants' Br. at 44. Additionally, Appellants Kerchner and Nelsen attempt to distinguish themselves from the public at large, pointing out that they took oaths to defend and support the Constitution as part of their past service in the Armed Forces and the National Guard. We stated in *Berg* that "[e]ven if . . . the placement of an ineligible candidate on the presidential ballot harmed [the plaintiff], that injury . . . was too general for the purposes

of Article III [because the plaintiff] shared . . . his 'interest in proper application of the Constitution and laws' . . . with all voters. . . .'" 586 F.3d at 240 (quoting *Lujan*, 504 U.S. at 573). That reasoning also controls our disposition here.

In their Reply Brief, Appellants assert that their case differs from *Berg* in several ways, including, among others, that the plaintiff in that case filed his claim against then-candidate Obama before the election and before the "Electoral College and Congress had . . . acted on Obama's qualifications. . . ." Appellants' Reply Br. at 25. On the contrary, the *Berg* court addressed standing based on those same assumed facts. *Berg*, 586 F.3d at 238-39. Just like the plaintiff in *Berg*, Appellants' alleged injuries are too generalized to be cognizable in Article III courts. As the District Court found, the requirement that an injury be "concrete and particularized" precludes claims based on "harms that are suffered by many or all of the American people." *Kerchner*, 669 F. Supp. 2d at 481 (quotation marks omitted) (citing *Lujan*, 504 U.S. at 573-74). The District Court further stated that:

> The Supreme Court has held that "even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."

> *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). Plaintiffs' claims fall squarely into the category of generalized grievances that are most appropriately handled by the legislative branch. The Court acknowledges Plaintiffs' frustration with what they perceive as Congress' inaction in this area, but their remedy may be found through their vote.

Id. at 483 n.5. We agree.

Turning to the argument of Kerchner and Nelsen that their oaths to protect and defend the Constitution "increase[ ] their adversarial posture," Appellants' Br. at 56, no court has found that a plaintiff established "injury in fact" simply because s/he had once taken such an oath. Carving out an exception on that basis would still leave an impermissibly large class with unique ability to sue in federal court. *See, e.g.*, 10 U.S.C. § 502(a) (requiring all military personnel to take an oath "swear[ing] . . . [to] support and defend the Constitution of the United States."). Kerchner's assertion of standing on the ground that he, who has been retired from the Naval Reserves since 1995, may be required to serve the Commander in Chief as a combatant in the case of an "extreme national emergency," *Kerchner*, 669 F.Supp.2d at 483 (quotation and citation omitted), is to no avail because it is conjectural. *See Lujan*, 504 U.S. at 560.

Appellants' equal protection claim is likewise non-justiciable for failure to establish "injury in fact." Their claims under the *First Amendment* are without merit because the individual right to petition does not "require government policymakers to listen or respond to individuals' communications on public issues." *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984).[3] We therefore agree with the District Court that Appellants lack standing. [4]

III.

Because we have decided that this appeal is frivolous, we will order counsel for Appellants to show cause why just damages and costs should not be imposed. Federal Rule of Appellate Procedure 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the

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3. The District Court, as an alternate holding, found that Appellants' claims are "barred under the 'political question doctrine' as . . . question[s] demonstrably committed to a coordinate political department." *Kerchner*, 669 F. Supp. 2d at 483 n.5. In light of our decision that Appellants lack standing, we need not discuss that issue.

4. We need not discuss Appellants' contention that "the original common law definition of an Article II 'natural born Citizen' . . . is a child born in the country to a United States citizen mother and father." Appellants' Br. at 18. That assertion goes to the merits of whether President Obama is in fact eligible to hold office, which we cannot address unless Appellants first establish Article III standing.

court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." "The purpose of an award of attorneys' fees under *Rule 38* is to compensate appellees who are forced to defend judgments awarded them in the trial court from appeals that are wholly without merit, and to preserve the appellate court calendar for cases worthy of consideration." *Huck v. Dawson*, 106 F.3d 45, 52, 35 V.I. 560 (3d Cir. 1997) (internal quotation and citation omitted). "Damages [under Rule 38] are awarded by the court in its discretion . . . as a matter of justice to the appellee." *Beam v. Bauer*, 383 F.3d 106, 108 (3d Cir. 2004) (internal quotation and citation omitted). An "important purpose [of a damages award] is to discourage litigants from unnecessarily wasting their opponents' time and resources." *Nagle v. Alspach*, 8 F.3d 141, 145 (3d Cir. 1993).

"This court employs an objective standard to determine whether or not an appeal is frivolous" which "focuses on the merits of the appeal regardless of good or bad faith." *Hilmon Co. v. Hyatt Int'l*, 899 F.2d 250, 253 (3d Cir. 1990) (internal quotation omitted). We have stated that "an appeal from a frivolous claim is likewise frivolous." *Beam*, 383 F.3d at 108. Appellants had ample notice that this appeal had no merit. They should have been aware that we rejected almost identical claims in *Berg*, as have courts in other jurisdictions. *See, e.g.*, *Barnett v. Obama*, No. 09-0082, F. Supp. 2d , 2009 U.S. Dist. LEXIS 101206, 2009 WL 3861788, at *4-*6 (C.D. Cal. Oct. 29, 2009) (holding that active and former military personnel lack Article III standing

requirements to challenge President Obama's eligibility for office); *Cohen v. Obama*, No. 08-2150, 2008 U.S. Dist. LEXIS 100011, 2008 WL 5191864, at *1 (D.D.C. Dec. 11, 2008) (holding that a federal prisoner who alleged that then-Senator Obama was "an illegal alien impersonating a United States citizen" lacked standing under Article III), *aff'd*, *Cohen v. Obama*, 332 F. App'x 640 (D.C. Cir. 2009).

Examination of this precedent would have made it "obvious to a reasonable attorney that an appeal from the District Court's order was frivolous, [as no] law or facts . . . support a conclusion that the District Court judge had erred." *Beam*, 383 F.3d at 109. Moreover, other courts have imposed sanctions for similar reasons. *See Hollister v. Soetoro*, 258 F.R.D. 1, 2-5 (D.D.C. 2009) (reprimanding an attorney under Federal Rule of Civil Procedure 11(b)(2) for signing and filing a complaint alleging that President Obama was ineligible to serve as president because he is not a "natural born Citizen"), *aff'd*, *Hollister v. Soetoro*, Nos. 09-5080, 09-5161, 2010 U.S. App. LEXIS 6005, 2010 WL 1169793 (D.C. Cir. March 22, 2010); *see also Rhodes v. MacDonald*, 670 F. Supp. 2d 1363, 1373 (M.D.Ga. 2009) (imposing monetary sanctions under Federal Rule of Civil Procedure 11(c)(3) against counsel who filed similar claims on behalf of members of the military), *aff'd*, *Rhodes v. MacDonald*, No. 09-15418, 2010 U.S. App. LEXIS 5340, 2010 WL 892848 (11th Cir. March 15, 2010).

In the past, "we cautioned counsel that a finding by a District Court that a lawsuit is frivolous should serve as notice to the parties and their attorney to exercise caution, pause, and devote additional examination to the legal validity and factual merit of his contentions." *Beam*, 383 F.3d at 109 (quotation omitted). Although the District Court did not explicitly state that Appellants' claims were frivolous, the finding of other district courts that plaintiffs who filed complaints based on similar legal theories violated Federal Rule of Civil Procedure 11 should have served as meaningful notice that the appeal here would be frivolous.[5] We therefore will order Appellants' counsel to show cause why he should not pay just damages and costs for having filed a frivolous appeal. *See* Fed. R. App. P. 38.

IV.

For the reasons set forth, we will affirm the District Court's order of dismissal.

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5. We also note with concern that Appellants failed to cite *Berg* in their opening brief. *See, e.g.*, N.J. Rule of Professional Conduct 3.3(a)(3) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client . . . ."). Although *Berg* was filed only some two months before Appellants' brief, it is unlikely it had not come to their attention given the identity of the issues.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED OCTOBER 20, 2009

No. 09-253

CHARLES F. KERCHNER, JR., et al.,

Plaintiffs,

v.

BARACK HUSSEIN OBAMA, II, et al.,

Defendants.

HONORABLE JEROME B. SIMANDLE

OPINION

SIMANDLE, District Judge:

Under Article II, Section 1, of the Constitution, a person must be a "natural born citizen" to be eligible for the office of President of the United States. Four individuals, believing that President Barack Obama is not eligible for his office on this ground, have filed suit seeking a court order to require various officials to look into their claims and to remove the President from office. Plaintiffs present various arguments for defining the term "natural born citizen" accompanied by allegations of how President Obama does not meet their definition.

Appendix B

This matter is presently before the Court on a motion to dismiss [Docket Item 27] submitted by Defendants President Barack Obama, the United States of America, the United States Congress, the United States Senate, the United States House of Representatives, former Vice-President and President of the Senate Richard Cheney, and Speaker of the House Nancy Pelosi (collectively, "Defendants"). For the reasons expressed below, the Court finds that Plaintiffs Charles F. Kerchner, Jr., Lowell T. Patterson, Darrell James LeNormand, and Donald H. Nelsen, Jr. lack standing to pursue their claims and so the Court must grant Defendants' motion to dismiss.

I. BACKGROUND

A. Factual Allegations

Plaintiffs' claims, as set forth in their Second Amended Complaint,[1] arise from allegations that President Obama has failed to sufficiently prove that he is a "natural born citizen" eligible for the presidency

1. The parties dispute whether Plaintiffs filed their Second Amended Complaint in conformance with Rule 15, Fed. R. Civ. P., and further whether that complaint is a short and plain statement required under Rule 8(a)(2). The Court will address the allegations of the Second Amended Complaint, notwithstanding that it was filed without leave of Court on February 9, 2009. Because the Court concludes that Plaintiffs lack standing to bring these claims, the Court will not address the procedural disputes, and Plaintiffs' belated motion for leave to assert the Second Amended Complaint on July 22, 2009, will be dismissed as moot.

and that the legislative branch has failed to sufficiently investigate President Obama's citizenship and place of birth. Plaintiffs all voted in the November 4, 2008 general election for president. (Second Am. Compl. ¶¶ 8-11.) Mr. Kerchner and Mr. Nelsen both took oaths to defend and support the Constitution of the United States — Mr. Kerchner as part of his thirty-three years of service in the U.S. Naval Reserves and Mr. Nelsen as a former member of the Marine Reserves and Army National Guard. (*Id.* ¶¶ 8, 11.) In addition, Mr. Kerchner states that his is particularly harmed by the alleged uncertainty surrounding President Obama's birthplace because "while currently not statutorily subject to recall, by Executive Order of the President or an act of Congress in extreme national emergency" Mr. Kerchner might be recalled. (*Id.* P 8.)

Plaintiffs claim violations of the First, Fifth, Ninth, Tenth, and Twentieth Amendments of the Constitution and seek declaratory and injunctive relief, as well as a writ of mandamus and *quo warranto*. In Court I, Plaintiff Kerchner alleges that the Congressional Defendants violated his First Amendment right to petition because they ignored his requests that they investigate President Obama's citizenship and place of birth. (*Id.* ¶¶ 200-214.) In Counts II and X, Plaintiffs allege that the Congressional Defendants violated their Fifth Amendment procedural due process rights and their rights under the Twentieth Amendment by failing to conduct an appropriate investigation and hold a hearing regarding President Obama's place of birth. (*Id.* ¶¶ 215-234, 329-356.) In Counts III and IV, Plaintiffs

allege that President Obama violated their substantive due process rights under the Fifth Amendment by holding the office of president without proving that he is a "natural born citizen" and that the Congressional Defendants violated these same rights by permitting President Obama to occupy the office and by failing to adequately confirm that his is a "natural born citizen." (*Id.* ¶¶ 235-270.) In Count V, Plaintiffs allege that the Congressional Defendants violated their Fifth Amendment right to equal protection by submitting to the requests of citizens who requested a hearing regarding Senator John McCain's place of birth and citizenship, but declining a similar request from Plaintiffs and other citizens regarding President Obama. (*Id.* ¶¶ 271-282.) In Counts VI, VII, VIII, and IX, Plaintiffs assert their rights under the Ninth and Tenth Amendments to compel President Obama to prove that his is a "natural born citizen" and to compel the Congressional Defendants to conduct appropriate congressional hearings under the Twentieth Amendment to determine whether President Obama is a "natural born citizen." (*Id.* ¶¶ 283-328.) In Count XI, Plaintiffs seeks a writ *quo warranto* removing and excluding President Obama from the office of President of the United States because he is not a "natural born citizen." (*Id.* ¶¶ 357-380.) Finally, in Count XII, Plaintiffs seek declaratory judgment against all Defendants defining "natural born citizen," and compelling the Congressional Defendants to hold a congressional hearing on the question and to remove President Obama from office if they determine he is not a "natural born citizen." (*Id.* ¶¶ 381-387.)

The harm alleged for all of these constitutional violations is that Plaintiffs have been deprived of their right to know whether President Obama is a "natural born citizen" and to have a president who is truly a "natural born citizen."[2] (*Id.* ¶¶ 208, 233, 251, 269, 282, 291, 302, 314, 325, 356, 377, 378.)

B. Procedural History

On January 20, 2009, Plaintiffs filed their initial complaints, which they subsequently amended twice. Plaintiffs filed their Second Amended Complaint on February 9, 2009. On June 26, 2009, Defendants filed the present motion to dismiss, in which they argue that Plaintiffs lack Article III standing as well as prudential standing to bring all of these claims before the Court. Defendants argue in the alternative that the United States, the United States Congress, and former Vice-President Cheney and Speaker Pelosi in their official

2. To the extent Plaintiffs also allege that they were injured merely by the government's failure to respond to their petitions requesting investigations and hearings, this is not a cognizable constitutional injury. Plaintiffs "have no constitutional right to force the government to listen to their views." *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 284-85, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984). As the Supreme Court has explained, "Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Id.* (citing *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464-466, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979)).

capacities, are entitled to sovereign immunity. Defendants Cheney and Pelosi are also entitled, Defendants argue, to legislative immunity, and Defendants Obama, Cheney, and Pelosi are entitled to qualified immunity as to all of Plaintiffs' claims.

II. DISCUSSION

A. Standard of Review

Defendants move to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), Fed. R. Civ. P. A determination of proper subject matter jurisdiction is vital, because "lack of subject matter jurisdiction voids any decree entered in a federal court and the continuation of litigation in a federal court without jurisdiction would be futile." *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1010 (3d Cir. 1987). An attack on subject matter jurisdiction can be either facial — based solely on the allegations in the complaint — or factual — looking beyond the allegations to attack jurisdiction in fact. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). Where, as here, the challenge to subject matter jurisdiction is facial, the Court must, for the purposes of this motion, take all the allegations in the complaint to be true and construe them in the light most favorable to the Plaintiffs. *Id.*

B. Article III Standing

Federal courts are courts of limited jurisdiction and may only consider those actions that meet the case or-

controversy requirements of Article III.[3] Essential to Article III jurisdiction is the doctrine of standing. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). To meet the minimal constitutional mandate for Article III standing Plaintiffs must show (1) an "injury in fact," (2) "a causal connection between the injury and the conduct complained of," and (3) that the injury will "likely" be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Plaintiffs' assertion of constitutional standing fails at the first prong, because Plaintiffs cannot establish an "injury in fact" as that phrase has been defined by the Supreme Court. Instead, while Plaintiffs feel themselves very seriously injured, that alleged grievance is one they share with all United States citizens.

An "injury in fact" is defined as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. The Supreme Court has interpreted the requirement that an injury be "concrete and particularized" to preclude harms that are suffered by many or all of the American

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3. Plaintiffs cite a Commonwealth Court of Pennsylvania decision, *Lawless v. Jubelirer*, 789 A.2d 820 (Pa. Commw. Ct. 2002), for the proposition that there are exceptions to the standing requirement at issue here. The Court wishes to clarify that Plaintiffs are asserting federal subject matter jurisdiction and consequently the various state court jurisdictional doctrines are inapplicable to this case.

people. *Lujan*, 504 U.S. at 573-74; *United States v. Richardson*, 418 U.S. 166, 176-77, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-22, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974); *Ex Parte Levitt*, 302 U.S. 633, 633, 58 S. Ct. 1, 82 L. Ed. 493 (1937). As the Court explained in *Schlesinger*,

> We reaffirm *Levitt* in holding that standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law. Only concrete injury presents the

> factual context within which a court, aided by parties who argue within the context, is capable of making decisions.

418 U.S. at 221. Consequently, "a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74.

In the present case, assuming as the Court must that Plaintiffs' allegations are true for the purposes of deciding this jurisdictional motion, the injury, if any, suffered by Plaintiffs is one that would be shared by all the American people. Plaintiffs allege that they have been injured because Defendants have not adequately established that the President is truly a "natural born citizen" and because, according to Plaintiffs, President Obama is not a "natural born citizen" and therefore an illegitimate president. These alleged harms apply equally to all United States residents. In fact, Plaintiffs' complaint repeatedly acknowledges that the injuries they allege are generally applicable to "the people."[4] As

4. By way of example, Plaintiffs' complaint outlines the various failures to adequately establish President Obama's place of birth "on Behalf of the Plaintiffs and the People." (Second Am. Compl. ¶¶ 84-188.) Plaintiffs identify the "Irreparable Harm" to be suffered as follows: "If Obama is sworn in as President of the United States and Commander in Chief, there will be substantial and irreparable harm to the stability of the United States, its people, and the plaintiffs."

explained above, the Supreme Court has consistently held that this generalized harm is not sufficient to establish standing under Article III. *Lujan*, 504 U.S. at 573-74.

In an effort to distinguish themselves from the rest of the citizenry, Plaintiffs point out that Mr. Kerchner and Mr. Nelsen have both taken oaths to protect and defend the Constitution. They also suggest that they feel more threatened by the alleged uncertainty surround President Obama's place of birth and citizenship than many citizens. While the Court accepts that Plaintiffs are more concerned about President Obama's birthplace than many citizens and that they likewise feel a greater sense of obligation to bring the present action, Plaintiffs' motivations do not alter the nature of the injury alleged. Plaintiffs state that they have been injured because President Obama's birthplace and citizenship have not been established to their satisfaction; this harm is equally applicable to all American citizens.

Finally, Plaintiffs point to the risk that Mr. Kerchner may be recalled to active duty in the U.S. Naval Reserves by Executive Order of the President or an act of Congress in an extreme national emergency. Under these circumstances, Mr. Kerchner "would need to know whether the President and Commander in Chief who may be giving him orders is in fact the legitimate President and Commander in Chief and therefore obligate him to follow those orders or risk being prosecuted for disobeying such legitimate orders."

(Second Am. Compl. P 8.) While the Court has doubts about the particularity of this harm, the Court will not address this issue because the alleged harm is neither actual nor imminent, but rather is impermissibly conjectural. The hypothetical nature of this future injury, conditioned on the occurrence of "an extreme national emergency," is not an "injury in fact" necessary to establish standing. *See Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 297 (3d Cir. 2003) (an allegation of potential future property loss, should a municipality disallow a present non-conforming use, cannot demonstrate injury in fact for standing purposes because it is conjectural). Without an "injury in fact" necessary for Article III standing, the Court cannot exercise jurisdiction over the present action.[5]

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5. Moreover, had Plaintiffs alleged an "injury in fact" sufficient to satisfy Article III standing, prudential standing concerns would likewise prevent the Court from exercising jurisdiction. The Supreme Court has held that "even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). Plaintiffs' claims fall squarely into the category of generalized grievances that are most appropriately handled by the legislative branch. The Court acknowledges Plaintiffs' frustration with what they perceive as Congress' inaction in this area, but their remedy may be found through their vote.

(Cont'd)

III. CONCLUSION

For the foregoing reasons, the Court will grant Defendants' motion to dismiss for lack of subject matter jurisdiction. The accompanying Order shall be entered.

October 20, 2009

JEROME B. SIMANDLE
United States District Judge

(Cont'd)

To this extent, it appears that Plaintiffs have raised claims that are likewise barred under the "political question doctrine" as a question demonstrably committed to a coordinate political department. *See Baker v. Carr*, 369 U.S. 186, 216, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). The Constitution commits the selection of the President to the Electoral College in Article II, Section 1, as amended by the Twelfth Amendment and the Twentieth Amendment, Section 3. The Constitution's provisions are specific in the procedures to be followed by the Electors in voting and the President of the Senate and of Congress in counting the electoral votes. Further, the Twentieth Amendment, Section 3, also provides the process to be followed if the President elect shall have failed to qualify, in which case the Vice President elect shall act as President until a President shall have qualified. None of these provisions evince an intention for judicial reviewability of these political choices.

APPENDIX C — STATUTORY PROVISIONS AND TREATISE INVOLVED

3 U.S.C. Sec. 15 provides in pertinent part:

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without

argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. . . . No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

28 U.S.C. Sec. 455 provides:

> Disqualification of justice, judge, or magistrate judge
>
> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:

Appendix C

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
(i) Is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

Appendix C

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Appendix C

Emer de Vattel, *The Law of Nations, or Principles of the Laws of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, bk. 1, c. 19, sec. 212 (original French in 1758 and first English in 1759, and other subsequent French and English editions)

§ 212. Citizens and natives.

The citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority, they equally participate in its advantages. The natives, or natural-born citizens, are those born in the country, of parents who are citizens. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. The country of the fathers is therefore that of the children; and these become true citizens merely by their tacit consent. We shall soon see whether, on their coming to the years of discretion, they may renounce their right, and what they owe to the society in which they were born. I say, that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner, it will be only the place of his birth, and not his country.

Id. 1797 English edition. The 1759 and later English editions translated the French words, "Les Naturels, ou Indigenes" into "The natives, or indigenes" instead of "The natives, or natural-born citizens" which first appeared in the 1797 English edition.

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IN THE

Supreme Court of the United States

CHARLES E. KERCHNER, JR., et al.,

Petitioners,

v.

BARACK HUSSEIN OBAMA, II, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* WESTERN CENTER FOR JOURNALISM IN SUPPORT OF PETITIONERS

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

Amicus curiae Western Center for Journalism, respectfully, moves for leave of Court to file the accompanying brief under Supreme Court Rule 37.3(b). Counsel for Petitioners has withheld consent; counsel for Respondent has consented to the filing of this brief.

STATEMENT OF INTEREST

Founded in 1991 by Joseph Farah and James H. Smith, the Western Center for Journalism has been sponsoring investigative journalism for over eighteen years.

Today, the Center is led by columnist and veteran broadcaster Floyd Brown. The Western Center for Journalism is a vigorous watchdog that keeps a check on government abuse and the media. The Center believes strongly in open public debate. It also believes that informed public debate requires quality journalism and reporting.

The Center is working to provide quality journalism and reporting by exposing bias and falsehoods in the mainstream media so that accurate information on important issues will be available to the public. The Western Center for Journalism website covers a wide variety of topics, from media bias, to media industry news and articles about online news sources and the impact of "citizen journalists".

In addition, the Center trains individuals to become "Citizen Journalists" and bloggers. These individuals are provided with technical training and practical advice on quality reporting and commentary.

The issue of a candidate for President of the United States not being required to conclusively prove his or her birth status is of great concern to Amicus because if determinations of eligibility are left to the political branches of government to decide, or to the political parties, then this will lead to candidates who clearly fail to meet the requirements of eligibility being elected to office simply because of their popularity, and there needs to be clear guidelines regarding proof of birth status as it pertains to eligibility to run for and serve in various elected positions.

For these reasons, amicus curiae respectfully requests that the Court grant leave to file this brief.

November 3, 2010.

Respectfully Submitted,

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

SUMMARY OF ARGUMENT 1

INTRODUCTION 1

ARGUMENT 2

I. QUESTIONS OF ELIGIBILITY ARE NOT POLITICAL QUESTIONS, BECAUSE POLITICAL BODIES, AND/OR POLITICAL PARTIES, MAY HAVE AN INTEREST IN APPROVING A NON-ELIGIBLE CANDIDATE 2

II. THE QUESTION OF VERIFYING THE ELIGIBILITY OF A CANDIDATE FOR PRESIDENT OF THE UNITED STATES, IF LEFT UNRESOLVED, COULD LIKELY RESULT IN MORE INELIGIBLE PERSONS SEEKING THE OFFICE, AND RECURRING LITIGATION OVER THE ISSUE 6

CONCLUSION 8

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Baker v. Carr,
369 U.S. 186 (1962) 4

Irby v. Barrett,
163 S.W.2d 512 (AK, 1942) 4, 5, 6

OTHER CASES

Drake, et al. v. Obama, et al.,
9th Circuit Case No. C062321
(C.D. Cal. filed January 20, 2009) 1

UNITED STATES CONSTITUTION

U.S. Constitution Article 2 .....6, 7, 8

U.S. Constitution Article 5 2

FEDERAL STATUTES

3 U.S.C. § 15 2

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER[1]

SUMMARY OF ARGUMENT

BECAUSE OF THE IMPORTANCE OF THE OFFICE OF PRESIDENT OF THE UNITED STATES, THE QUESTION OF ELIGIBILITY TO RUN FOR AND SERVE IN THE OFFICE CANNOT BE LEFT TO THE POLITICAL BRANCHES OF THE GOVERNMENT, OR TO THE POLITICAL PARTIES, SINCE THE POLITICAL BRANCHES AND/OR THE POLITICAL PARTIES MAY HAVE AN INTEREST IN APPROVING A NON-ELIGIBLE CANDIDATE, AND, IF THIS ISSUE IS LEFT UNRESOLVED, IT COULD LIKELY RESULT IN MORE INELIGIBLE PERSONS SEEKING THE OFFICE AND RECURRING LITIGATION AS A RESULT.

INTRODUCTION

Amicus brings the following arguments in support of Petitioner's writ of certiorari, based on *Drake, et al. v. Obama, et al.*, 9th Circuit Case No. C062321 (C.D. Cal. filed January 20, 2009), a case currently pending before the U. S. Ninth Circuit Court of Appeals, which

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have been given appropriate notice of amicus curie's intention to file this brief. The petitioners have refused and the consent of the respondents is being lodged herewith.

addresses issues related to those raised by Petitioner concerning Barack Hussein Obama's eligibility to serve in the office of President of the United States.

ARGUMENT

I. QUESTIONS OF ELIGIBILITY ARE NOT POLITICAL QUESTIONS, BECAUSE POLITICAL BODIES, AND/OR POLITICAL PARTIES, MAY HAVE AN INTEREST IN APPROVING A NON-ELIGIBLE CANDIDATE

Federal law allows Congress to resolve questions regarding the vote of a Presidential Elector (3 U.S.C. § 15), but this is a remedy limited to problems with Electors and does not extend to the eligibility of a candidate, as 3 U.S.C. § 15 only allows for objections regarding "any vote or paper from the State." Since this action is a dispute over the eligibility of Barack Obama for the office of President of the United States, and not a dispute over whether the Electors properly cast their vote, this statute does not apply to the underlying issue at hand.

In addition, a provision of the Constitution may not be disregarded by means of a popular vote of the people, as there are specific guidelines for amending the Constitution of the United States. In order to do so, the U.S. Constitution, Article 5, requires a two-thirds vote of both houses of Congress and ratification by three-fourths of all State legislatures in the United States (U.S. Constitution. Article 5). Even if the people of the United States voted to elect as President a candidate who did not qualify for the position, that vote would not be sufficient to overcome the Constitutional

requirements for office and make that candidate eligible. Once a name is placed on a ballot, voters are only concerned with whether they prefer one candidate over another candidate, as it can be rightfully inferred by said voters that the threshold issue of eligibility has already been determined by virtue of the candidate names having been placed on the ballot. Additionally, the candidates for the Office of President of the United States are not required to prove any eligibility issues to the voters at all, and, instead, candidates are tasked with convincing the voters to vote for that particular candidate over the other candidates. Because voters can and do vote for candidates that are liked by the voters, even if those candidates may not be eligible for the position, the voters do not have the power, or the right, to determine the eligibility of a candidate. For the Court to hold otherwise would be to strip all candidates not winning a majority of the votes cast of all political power, as the laws would be based upon the whims of the majority of voters, rather than on the Rule of Law.

Furthermore, the Electoral College is not empowered with the authority to determine the eligibility of any candidate for President. In twenty-six States and the District of Columbia, Presidential Electors are prohibited by statute from voting in variance with their pledges, or the votes of a majority of the voters in their State or District, or, if they do, they face civil and/or criminal penalties and fines. The act of determining eligibility is one that requires discretionary authority, so that a candidate found to be ineligible may be removed or precluded from placement on the ballot. However, any discretionary authority of

the majority of the States' Presidential Electors has been removed by statute, and the Presidential Electors, instead, perform a ministerial function of casting their votes in accordance with the popular vote of the State that each Elector represents. Any assertion that the Electoral College has the authority to make any determination of a Presidential candidate's eligibility to serve in the office is unpersuasive, because, while the historical intent of the of the Electoral College was to allow for such determinations, the modern majority trend of the States is to limit the duties of the Presidential Electors to the ministerial role of casting a vote for the candidate chosen by the popular vote of their respective States or District. For these reasons, the ministerial power to determine and/or exclude a candidate's eligibility is not found within the Electoral College.

Finally, political boards, committees, and panels, in general, such as the United States Congress, are not proper bodies for making determinations of eligibility in this situation because of the significant risk of "corrupt and partisan action" (*Irby v. Barrett* (AK, 1942) 163 S.W.2d 512, 514). Matters committed by the Constitution to the non-judicial branches of the Federal Government are political in nature. *Baker v. Carr* (1962) 369 U.S. 186, 211. Thus, the Office of President of the United States is designed to decide political issues. In like manner, the United States Congress is a political body with the power to legislate political matters. In addition to its political powers, Congress has internal rules concerning whether to seat or remove their own members, but these rules do not extend to eligibility of candidates for the Office of President of the United

States. Since both the Congress and the President are political bodies, any Congressional authority to determine whether a candidate meets the requirements for the Office of President would be suspect, as the determinations would depend on which political party was in the majority at the time. A related issue was considered by Court in *Irby v. Barrett*, which held:

"If the Chairman and Secretary of the Committee have the right to say that because of the decision of this court petitioner is ineligible to be a candidate for office, they may also say, in any case, that for some other reason a candidate is ineligible. For instance, it has been held by this court in many election contests that one must pay his poll tax; that he must do so after proper assessment in the time and manner required by law, and that otherwise he is not eligible even to vote, and unless he were a voter he could not hold office. So with other qualifications, such as residence. May this question be considered or decided by the Chairman and Secretary of the Committee? It may be that such power can be conferred upon them by laws of this State or the rules of the party; but it is certain that this has not yet been done. If this can be done, and should be done, the door would be opened wide for corrupt and partisan action. It might be certified that a prospective candidate has sufficiently complied with the laws of the State and the rules of a political party to become a candidate, and, upon further consideration, that holding might be recalled; and this might be done before that action could be reviewed in a court of competent jurisdiction and reversed in time for the candidate to have his name placed on the ticket. It would afford small satisfaction if, after the ticket had been printed with the name of

the candidate omitted, to have a holding by the court that the name should not have been omitted." (*Irby v. Barrett* (AK, 1942) 163 S.W.2d 512, 514).

Since the Office of President of the United States is the most powerful position in the country, the risk of "corrupt and partisan action" is great if the authority to determine eligibility is placed in the hands of those who are likely to gain an advantage over their opposing political parties. Given this risk, the proper remedy for eligibility disputes is to bring such disputes to the Court for a determination, rather than to Congress or to the Electoral College, and this Court has the power to make determinations of fact and law regarding controversies over the eligibility of a political candidate with little likelihood of partisan results. For all these reasons, the issue of a candidate's eligibility is not a political question, the Court may properly make a determination on this issue, and this Court should grant Petitioner's writ of certiorari.

II. THE QUESTION OF VERIFYING THE ELIGIBILITY OF A CANDIDATE FOR PRESIDENT OF THE UNITED STATES, IF LEFT UNRESOLVED, COULD LIKELY RESULT IN MORE INELIGIBLE PERSONS SEEKING THE OFFICE, AND RECURRING LITIGATION OVER THE ISSUE

This is a matter of first impression. There is no governmental authority tasked with verifying whether a Candidate for the President of the United States is, in fact, a natural born citizen, as required by the United States Constitution, Article 2.

Amicus requests that this Court resolve the current issue of who has the authority to verify that a Presidential candidate meets the Constitutionally required eligibility requirements, as there remains a question as to whether absurd results may occur unless this Court so determines. Arnold Schwarzenegger is well known as having been born in Austria. If there are no means of compelling verification of a Presidential candidate's birth status, and no court has the power to do so, Mr. Schwarzenegger could run for, and be elected, President of the United States, as there are, according to Respondents, no means of demanding compliance with the Constitutional requirements for the position. Further, if the Libertarian Party were to nominate the late Ayn Rand as their candidate for President, could she be removed from the ballot on the grounds that she is not a natural born citizen of the United States? Finally, if the current Prime Minister of the United Kingdom, David Cameron, were to be nominated by a political party to run for the office of President of the United States, could he do so on the grounds that there is no one with the authority to verify his status as required under Article 2 of the U.S. Constitution. Because of the strong potential of further abuses and absurd results, as well as recurring litigation on the issue, *Amicus* respectfully request that this Court grant Petitioner's writ of certiorari.

CONCLUSION

As discussed above, this matter is not a political question outside this Court's jurisdiction to hear. Article 2 of the U.S. Constitution sets forth the minimum requirements for a candidate for the office of President of the United States, for which there now are, according to Respondents, no standards or bodies authorized to make any determination of eligibility. Lacking such may result in clearly ineligible persons being elected in the future unless this issue is resolved by this Court. For these reasons, *Amicus* respectfully request that this Court grant Petitioner's writ of certiorari.

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